In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-170.

JAMES ROBERT ANDRINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that because his state felony convictions were expunged under California and Nevada statutes he was no longer a convicted felon barred from acquiring firearms; that the court of appeals was required to address each of his claims of error; and that the government improperly kept his name on an "organized crime watch list," which deprived him of due process and equal protection.

Following a jury-waived trial in the United States District Court for the District of Arizona, petitioner was convicted on each count of a twelve-count indictment (Pet. App. C) charging him with making false statements in connection with the acquisition of a firearm and with receiving and possessing firearms as a convicted felon, in violation of 18 U.S.C. 922(a)(6) and 924(a) and 18 U.S.C. App. 1202(a)(1). He was sentenced to concurrent

terms of two years' imprisonment on each count, to run consecutively to sentences he was then serving for other offenses (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Briefly, the evidence showed that petitioner had previously been convicted of conspiracy to commit acts of prostitution in 1959 in California and of swindling in Nevada in 1963. Both offenses of which he was convicted were felonies, punishable by imprisonment of more than one year. These convictions were subsequently expunged pursuant to the applicable California and Nevada statutes.[1] Following these expungements, petitioner purchased firearms from licensed gun dealers on three occasions in June and August 1970. In each case, petitioner stated on the required federal form for firearm purchases (Form 4473; see 26 C.F.R. 178.124(a)) that he had never been convicted of a felony.

1. The first six counts of the indictment charged petitioner with making false statements to a gun dealer in connection with obtaining firearms. It is undisputed that petitioner had been convicted of felonies in both Nevada and California prior to making these statements. However, petitioner claims that because his convictions were expunged pursuant to the applicable state statutes he was not a convicted felon within the meaning of the statute. This contention is refuted by the California expungement statute. The statute was amended in 1961 to provide that dismissal of an accusation under the expungement statute would not permit an individual to "own, possess or have

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[1]See California Penal Code 1203.4 and Nevada Revised Statutes 176.225 (Pet. 4-6). Both statutes provide for the expungement of criminal convictions in certain instances based on successful completion of probation, economic hardship, etc. Expungement results in a removal of any existing legal disabilities.

in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."[2] California Penal Code 1203.4. Thus, California has by statute rejected the proposition that expungement is a defense to a charge of possession of a firearm by a previously convicted felon.[3] Since expungement is not a defense to a California charge of possession of a firearm by a convicted felon, petitioner cannot properly claim that the expungement eliminated his conviction for purposes of the federal statute.

2. Petitioner contends (Pet. 10-12) that the court of appeals was required to consider his attacks on Counts Seven through Twelve of the indictment despite its affirmance of his conviction on the first six counts. The court of appeals correctly held (Pet. App. A, p. 6):

> Because the defendant was convicted on each of twelve counts, and received the same sentence on each, which were to be served *concurrently*, we need not, for the convenience of the Court decide the validity of the convictions in counts seven to twelve, inclusive. *See United States* v. *Gaines*, 460 F. 2d 176 (2d Cir., 1972).

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[2]Section 12021 prohibits possession or control of a concealable firearm by a convicted felon. The weapons involved in this case are pistols (Pet. App. C).

[3]In support of his argument that the expungement statute relieves him of the responsibility of divulging his past criminal conviction, petitioner relies on *People* v. *Taylor*, 178 Cal. App. 2d 472, 3 Cal. Rptr. 186. However, *Taylor* was decided prior to the 1961 amendment making the expungement statute unavailable as a defense to a charge of possession of a firearm by a convicted felon.

The court of appeals correctly held that analysis of the Nevada statute was unnecessary because petitioner's California felony conviction was sufficient to support his conviction on the first six counts.

See also *Benton* v. *Maryland*, 395 U.S. 784; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

3. Finally, petitioner contends (Pet. 13-14) that the government violated due process and equal protection when it maintained his name on a "select list" of known felons. There is certainly no impropriety in law enforcement officers making use of public records of past convictions for law enforcement purposes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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